SUPREME COURT, U. S. 70-5058

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 6356

DOROTHY LYNCH, ET AL,

Appellants,

v.

HOUSEHOLD FINANCE CORP., et al,

Appellees.

NORMA TORO, et al,

Appellants,

v.

EUGENE A. CAMPOSANO, et al,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE APPELLEE, CHARLES H. BARRETT DEPUTY SHERIFF OF NEW HAVEN COUNTY

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APPELLANTS APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT ENTERED ON OCTOBER 22, 1970, DISMISSING THEIR COMPLAINTS UPON APPELLEE'S MOTION TO DISMISS.

OPINION BELOW

The opinion of the District Court for the District of Connecticut is reported in 318 F. Supp. 1111 and in the Appendix at pages 20 through 27.

JURISDICTION

Jurisdiction for the suit was claimed under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 and a permanent injunction and declaratory judgment was sought on allegations that the Connecticut garnishment statutes (Title 52, § 329, Connecticut General Statutes) were unconstitutional. A three-judge District Court was convened on March 9, 1970 pursuant to 28 U.S.C. §§ 2281 and 2284. The judgment of the District Court dismissing the action was entered on October 22, 1970 and a Notice of Appeal was filed on November 19, 1970. Appellants claim jurisdiction for the appeal in the Supreme Court under 28 U.S.C. §§ 1253 and 2101(b).

STATEMENT OF THE CASE

The Appellant, Norma Toro, plaintiff below, is a divorcee with one minor son. Mrs. Toro works in a shirt factory earning $85.00 per week and receives state welfare payments under the Aid for Dependent Children Program. (Appendix pages 34, and 45-46.)

On or about October 6 1969, Mrs. Toro leased first floor premises at 625 Main Street, East Haven, Conneticut, from Appellee, Eugene A. Camposano, for a period of one (1) year at a monthly rental of $150.00 per month. (Appendix pages 39 and 46.)

During the month of January, 1970 Mrs. Toro vacated said premises, resulting in a dispute between her and Mr. Camposano. (Appendix pages 38 through 40 and 45 through 47.)

On January 27, 1970 Attorney Jerome A. Lacobelle of New Haven, representing Mr. Camposano, issued a writ, summons and complaint, seeking $700 in damages, for service upon Mrs. Toro and further commanding a garnishment of

Acct. No. 02200049 at The Hamden National Bank, Hamden, Connecticut. (Appendix pages 38 through 41.) Attorney Lacobelle gave the writ, summons and complaint into the hands of Appellee, Charles H. Barrett, a deputy sheriff of New Haven County, for service and return to court.

Sheriff Barrett commenced service on January 30, 1970 by leaving a true and attested copy of the process at The Hamden National Bank and completed service on January 31, 1970 by abode service on Mrs. Toro. The writ, summons and complaint was returned to court by filing with the Clerk of the 8th Circuit Court on February 10, 1970. (See Appellant, Norma Toro's brief at page 10, note 3.)

At the time of the garnishment against Mrs. Toro's account at The Hamden National Bank on January 30, 1970, she had on deposit the sum of $103.99. (Appendix page 46.)

On March 16, 1970 Mrs. Toro executed a disclosure of defenses to Mr. Camposano's suit and filed the same with the 8th Circuit Court at West Haven, Connecticut. Said diselosure of defense does not set forth any claims that the garnishment statute in Title 52, Section 329, Connecticut General Statutes, is unconstitutional. (Appendix pages 47 and 48.)

Attorney Lacobelle released the attachment of Mrs. Toro's checking account on March 31, 1970. (Appendix page 22, footnote 1.)

This action for declaratory and injunction relief was filed in the United States District Court for the District of Connecticut on March 4, 1970. (Appendix page 33.)

The Appellee, Charles H. Barrett, Deputy Sheriff of New Haven County, filed a motion to dismiss on March 25, 1970. (Appendix page 52.) Said motion was granted by a three-judge court on October 22, 1970. (Appendix page 27.)

Notice of appeal to the Supreme Court of the United States was filed on November 19, 1970. (Appendix page 32.)

Probable jurisdiction was noted by the Supreme Court on March 1, 1971. (Appendix page 54.)

QUESTIONS PRESENTED

1. Did the three-judge District Court err in dismissing the action for want of jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(c)?

2. Did the three-judge District Court err in dismissing the action under the anti-injunction statute 28 U.S.C. § 2283?

STATUTE IN QUESTION

I. Section 52-329, Connecticut General Statutes, Revision of 1958, Revised to 1969:

"Process of foreign attachment.

When the effects of the defendant in any civil action in which a judgment or decree for the payment of money may be rendered are concealed in the hands of his agent or trustee so that they cannot be found or attached, or when a debt is due from any person to such defendant, or when any debt, legacy or distributive share is or may become due to such defendant from the estate of any deceased person or insolvent debtor, the plaintiff may insert in his writ a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint, at least twelve days in the case of the superior court or the court of common pleas, or six days in the case of the circuit court, before the session of the court to which it is returnable, with such agent, trustee or debtor of the defendant, or, as the case may be, with the executor, administrator or trustee of such estate, or at

the usual place of abode of such garnishee; and from the time of leaving such copy all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee to the defendant, and and debt, legacy or distributive share, due or that may become due to him from such executor, administrator or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover. (1949 Rev., S. 8074; 1961, P.A. 280.)"

SUMMARY OF ARGUMENT

A deputy sheriff who serves a writ of garnishment in connection with civil process under Connecticut law is not a public officer acting under color of state law within the meaning of 42 U.S.C. § 1983. After the commencement of the Toro case in federal district court, the garnishment of Mrs. Toro's checking account was released, thus rendering the case moot.

Property rights, as distinguished from personal liberty rights, are not justiciable under 42 U.S.C. § 1983. The garnishment of a checking account, unlike the prejudgment *ex parte* garnishment of wages or welfare payments, does not rise to the status of a personal liberty right.

The plaintiffs do not constitute a valid civil rights class in that persons with checking accounts subject to garnishment is so large a class that these plaintiffs are not representative nor can they clearly and adequately protect the interests of the class. Futhermore, the interests of such a class are so varied as to be vague, indefinite and impossible to ascertain.

Finally, both cases involve pending civil proceedings before Connecticut civil courts. Under the doctrine of abstention as embodied in 28 U.S.C. § 2283 the injunctive relief sought, to stay the state court proceedings, is prohibited.

ARGUMENT

I.

DEPUTY SHERIFF BARRETT IS NOT A PUBLIC OFFICER ACTING UNDER COLOR OF STATE LAW WITHIN THE MEANING OF 42 UNITED STATES CODE, SECTION 1983.

Under the Connecticut Statutes service of process in civil actions may be made by the sheriff of the county in which the defendant resides, his deputy, a constable or other proper person or by some indifferent person. Section 52-50 Connecticut General Statutes. In practice, service is generally made by the deputy sheriffs of the various counties primarily because they can cover all towns within a county and also because they are more knowledgeable concerning service and the making of attachments and garnishments.

The office of sheriff was in existence in Connecticut prior to the adoption of the State's first Constitution in 1818. For many years sheriffs have acted generally as peace officers. In recent times, however, their duties have been substantially modified. The duties of a sheriff or a deputy sheriff in making service of civil process are enumerated in Title 6 of the Connecticut General Statutes. Section 6-32 requires each sheriff to serve all process directed to him and if he fails to execute and return such process, or makes a false or illegal return thereof, he is personally liable in trespass to the party aggrieved. Section 6-37 concerns deputy sheriffs and delegates to each deputy the same powers as the sheriff and imposes liability on the sheriff for the neglect, wrongdoing, malfeasance, misfeasance and default of his deputies. Section 6-30 requires each sheriff to file a bond payable to the State, conditioned that he will fully discharge the duties of his office and answer all damages which any person may sustain by virtue of his neglect or malfeasance. Section 6-39 requires

each deputy sheriff to file a bond with the sheriff conditioned that each deputy shall faithfully discharge the duties of his office. Section 6-45 provides that appointments of deputy sheriffs shall be in writing under the hand of the sheriff and recorded in the records of the Superior Court in the County for which they are appointed. Such deputy sheriffs serve at the pleasure of the sheriff. Section 6-46 in short provides that if any sheriff is sued on account of the default of his deputy, he may recover on the bond of such deputy the amount which he has been compelled to pay on account of such default. Sheriffs are prohibited from receiving any compensation from any deputy sheriff.

Dayton v. *Lynes*, 30 Conn. 351, 356, holds that deputy sheriffs under our system are independent officers as distinctly recognized by law as the sheriffs themselves. They are not the agents of the sheriffs as was the situation under common law.

> "A deputy sheriff duly appointed and approved now executes all the duties of his office entirely independent of sheriff, and not as his bailiff or servant. Writs may be directed to him alone without naming the sheriff, and by the express provisions of the statute he has the same powers as the sheriff himself. The negligences and defaults of the deputy, therefore, so acting independently of the sheriff, on his own authority derived from the law itself and not from the sheriff, ought not to be considered or treated as the personal torts or defaults of the sheriff; . . ."

Thus in making the service in the civil action of which Mrs. Toro complains; the sheriff was carrying out the routine functions of his office as a person authorized to serve civil process. There is no allegation that the defendant Deputy Sheriff Barrett abused his authority or did not abide by the mandatory directions in the writ, summons and complaint in the

case of *Camposano* v. *Toro* (8th Circuit Court). The deputy sheriff in this instance was not a person acting under color of law but rather should be considered as a private individual for the purposes of 42 U.S.C., Section 1983.

A civil action in Connecticut practice must contain a writ of summons or attachment, describing the parties, the court to which it is returnable, and the time and place of appearance. Every such writ must be signed by a Commissioner of the Superior Court, or Judge or Clerk of the Court to which it is returnable. Section 52-89, Connecticut General Statutes. When signed, the writ is delivered to a proper officer who must make service in accordance with the statutes and as directed by the writ. If he fails to make service or exceeds the authority vested in him by law, then the deputy sheriff or the person making service is personally liable in trespass to any party damaged thereby. After service, the Complaint is returned to Court. The status of the officer making service is analogous to the standing of an attorney who represents the plaintiff in civil proceedings.

> "Under 42 U.S.C. §§1983, 1985, the defendant must have acted under color of State law. For purposes of §§1983, 1985, an attorney is just another private individual. His status as an 'officer of the court' does not make him an officer of the Commonwealth of Pennsylvania or of any governmental subdivision thereof. *Pugliano* v. *Staziak*, 231 F. Supp. 347, 351 n.5 (W.D. Pa. 1964) affirmed, 345 F. 2d 797 (3d Cir. 1965); *Kregger* v. *Posner*, 248 F. Supp. 804, 806 (E.D. Mich. 1966). Leonard Tinter, Esq., apparently was acting in his profession as an attorney at the time complained of, and the action also must be dismissed as to him. The whole complaint is patently frivolous."
>
> *Johnson* v. *Kreider*, 264 F. Supp. 188 (1967)

". . . an attorney's status as an officer of the court does not make him a person who is acting under color of law. He is considered a private individual for purposes of § 1983."

Reinke v. *Richardson*, 279 F. Supp. 155 (1968)

"The instant case was private litigation in which the state did no more than furnish the forum. It had no interest whatever in the outcome. There was no denial of rights under the Fourteenth Amendment or a claim stated upon which relief could be granted under the Federal Civil Rights Acts . . . .

Lawyers who participate in the trial of private state court litigation are not state functionaries acting under color of state law within the meaning of the Federal Civil Rights Acts. *Cooper* v. *Wilson*, 6 Cir., 309 F. 2d 153 (1962); *Swift* v. *Fourth National Bank of Columbus, Georgia*, D.C.M.D. Ga., 205 F. Supp. 563 (1962)."

Skolnick v. *Martin*, 317 F. 2d 855, 857, (1963)

See also *Swift* v. *Fourth National Bank of Columbus, Georgia*, 205 F. Supp. 563 (1962); *Bottone* v. *Lindsley*, 170 F. 2d 705.

As noted previously service of civil process under § 52-50 may, at the discretion of the attorney issuing the writ, summons and complaint, be directed to either a sheriff, a deputy sheriff, a constable or other proper person or some indifferent person. In the garnishment action of which the plaintiff complains service was directed to the sheriff of the County of New Haven, his deputy or city sheriff or the constable of the Town of East Haven. The funds in the custody of the defendant Hamden National Bank were reached by foreign attachment, generally called garnishment, and resulted in

requiring the bank to hold such funds in its custody pending disposition of the civil action. This defendant has not thereby deprived the plaintiff of her liberty or property without due process of law.

In this case the plaintiff's Complaint is inadequate with respect to the defendant, Sheriff Barrett, in that it fails to allege that he deprived the plaintiff of her constitutional rights while acting under color of state law. The only allegation in the Complaint is the conclusory pleading that Attorney Lacobelle was acting under color of law (Appendix p. 35, par. 14.) This allegation is unsupported by any facts showing a deprivation of constitutional rights. *Cohen* v. *Norris*, 300 F. 2d 24, 30 (1962). Plaintiff's failure to allege acts of misconduct on the part of the defendants is fatal. It has been repeatedly held that the phrase "under color of state law" contemplates only the misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.

II.

THE TORO CASE IS MOOT BECAUSE OF THE RELEASE OF THE GARNISHMENT.

Attorney Jerome A. Lacobelle released the attachment of Mrs. Toro's checking account on March 31, 1970. It is recognized that where one or more of the issues in a suit becomes moot prior to or during the action, the Court should not adjudicate them. 6A Moore's Federal Practice ¶ 57.13 at 3072. Thus in an action for a declaratory judgment that a patent was void, where the patent was sold prior to trial and defendant no longer owned it, the case was held moot. *National Hairdressers' and Cosmetologists' Assn., Inc.* v. *Philad Co.* (D. Del. 1944) 4 FRD 106.

An issue becomes moot and hence no longer justiciable when as a result of intervening circumstances there are no longer adverse parties with sufficient legal interests to maintain the litigation. 6A Moore's Federal Practice 57.13 at 3074. This principle was illustrated in *Miller* v. *Udall*, 368 F. 2d 548 (C.A. 10, 1966). The Court held that a challenge to the Secretary of Interior's refusal to lease certain property in Utah became moot when a United States District Court ruled that the land in question was owned by the State of Utah, not the federal government.

Similarly, a suit for declaratory judgment and an injunction to permit distribution of campaign literature on a public sidewalk for a candidate for the Democratic Presidential nomination was held moot once the nominating convention had been held. *Seidel* v. *Cahn*, 288 F. Supp. 990 (E. D. N.Y. 1968).

In another case a claim for an injunction against alleged actual and threatened interference with a proposed rally necessarily became moot after the date of the proposed rally came and went. *Fowler* v. *United States*, 258 F. Supp. 638 (C. D. Cal. 1966). In that situation, the proposed rally date was after suit had been brought but fell before the final decision.

It has been held that a suit for improper administration of a state poll tax became moot when a new state statute made the poll tax unnecessary for voting. *Munoz* v. *Amador*, 340 F. 2d 590, (U.S.C.A. 5, 1965). Where a declaratory judgment had been rendered on a collective bargaining agreement, but the agreement had expired prior to appeal, the case became moot and had to be dismissed accordingly. There was no longer an "actual controversy", a prerequisite under the Declaratory Judgment Act. 28 U.S.C. § 2201. *General Electric Co.* v. *Local* 761, (C.A. 6, 1968). 395 F. 2d 891.

Other instances of mootness are numerous. When a challenged AFDC welfare regulation is no longer applied, injunctive relief must be denied. *Robinson* v. *Washington*, 302 F. Supp. 842, (Dist. Col. 1968). Where cruel and unusual treatment of prisoners has ceased and it does not appear that it will be resumed, injunctive relief is also inappropriate. *Knuckles* v. *Prasse*, 302 F. Supp. 1036 (E.D. Pa. 1969). Where a claimant for conscientious objector status was so classified by the time of judicial decision though after suit had commenced, his action was also moot. *United States* v. *Reynolds*, 300 F. Supp. 503 (N.D. Cal. 1968). Similarly, the United States District Court of Connecticut has ruled that repeal of an allegedly unconstitutional statute renders that issue moot. *Sessions* v. *State of Connecticut*, 293 F. Supp. 834. (1968).

Accordingly, the release of the garnishment in this case makes the present suit moot in that there no longer is an actual controversy within the meaning of the Declaratory Judgment Act.

III.

PROPERTY RIGHTS ARE NOT JUSTICIABLE UNDER 42 UNITED STATES CODE, SECTION 1983.

Title 28 U.S.C. § 1331 (a) vests civil jurisdiction over federal questions in the district courts only where the matter in controversy exceeds $10,000.00. Section 1343 (3) and (4) of the Code, however, eliminates the requirement of a jurisdictional amount in certain actions brought under the Civil Rights statute, 42 U.S.C.A. § 1983. Nevertheless, where only property rights are involved, Section 1331 (a) would be rendered virtually meaningless if its jurisdictional amount requirement could be evaded by coloring the complaint as a Civil Rights one with purported jurisdiction under § 1343.

This jurisdictional conflict was reconciled by Mr. Justice Stone, concurring in *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1939), as follows:

> "By treating [§ 1343] as conferring federal jurisdiction of suits brought under the Act of 1871 in which the *right asserted is inherently incapable of pecuniary valuation* we harmonize the two parallel provisions of the Judicial Code, construe neither as superfluous, and give to each a scope in conformity with its history and manifest purpose." 307 U.S. at 530. (Emphasis supplied.)

Justice Stone distinguished between *Holt* v. *Indiana Mfg. Co.*, 176 U.S. 68 (1900) where a patent right was held not a "civil right" under § 1343's predecessor, and other decisions where ". . . the gist of the cause of action was not damage or injury to property, but unconstitutional infringement of a right of personal liberty not susceptible of valuation in money". 307 U.S. at 531. He concluded, ". . . whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction in the district court" regardless of amount of claim. *Id.* (Emphasis supplied.)

Justice Stone's opinion was recently followed in *Eisen* v. *Eastman*, 421 F. 2d 560 (C.A. 2, 1969) where a landlord challenged the constitutionality of rent control legislation and the propriety of rent reductions under that law. The Court stated:

> ". . . there seems to be something right about it, especially if one accepts, as we do, his premise that the overlap between 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3) should be explained in some rational way. It has the merit of preserving not only the kind of case that was at the core of Congressional concern in 1871 but a good many others that Congress would probably desire to have

within the statute, while at the same time excluding cases that neither the Reconstruction Congress nor later Congresses could really have had in mind." 421 F. 2d 565-566.

Ruling that the complaint involved only property rights and not personal liberty, the Court found no jurisdiction for those claims under $10,000.00. The cases following Justice Stone's interpretation were referred to in *Eisen*, and this Supreme Court has either affirmed or denied certiorari where these decisions were appealed. See, e.g., *Reiling* v. *Lacey*, 93 F. Supp. 462 (D. Md. 1950), app. dism. 341 U.S. 901 (1951); *Abernathy* v. *Carpenter*, 208 F. Supp. 793 (W.D. Mo. 1962) [alternative ground], aff'd, 373 U.S. 241 (1963); *Gray* v. *Morgan*, 371 F. 2d 172 (C.A. 7, 1966), cert. den. 386 U.S. 1033 (1967); *Hornbeak* v. *Hamm*, 283 F. Supp. 549 (M.D. Ala.), aff'd, 393 U.S. 9 (1968). It is also noteworthy that one of the cases cited in *Eisen* as a non-civil rights action was *Howard* v. *Higgins*, 379 F. 2d 227 (C.A. 10, 1967), where it was alleged that a sheriff had unconstitutionally deprived someone in his custody of personal property.

Justice Stone's opinion in *Eisen* must be reconciled with *King* v. *Smith*, 392 U.S. 309 (1968) which held illegal the substitute parent rule in Welfare aid. A close examination of *King* and subsequent welfare cases indicates that this Supreme Court has been quite aware of the property rights — personal liberty distinction and in fact has closely adhered to it. *King* involved both constitutional and statutory claims seeking relief under § 1983. The Court found the State AFDC statutes inconsistent with the Social Security Act and thus did not reach the constitutional issue. In so doing it noted:

"We intimate no views as to whether and under what circumstances suits challenging AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts. See generally

Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84 (1967)." 392 U.S. at 314, n. 3.

The Law Review note cited stated that "Jurisdiction of the federal district court (in Welfare appeals) over such a cause of action (based on due process) would clearly exist under § 1343(3) of the Judicial Code, *and there would be no need to establish that the amount in controversy exceeds* $10,000.00." *Id.* at 96-97. (Emphasis supplied.) Thus the court was aware of the problem of jurisdictional amount. The authority cited by the Law Review for this proposition, moreover, was *Douglas* v. *Jeanette*, 319 U.S. 157 (1943). That decision held illegal a requirement of a license and tax for distribution of merchandise orders as applied to literature on the teachings of the Jehovah Witnesses. It is significant that the *Douglas* Court then stated:

> "As we held in *Hague* v. *CIO*, 307 U.S. 496, 507-514, 527-532, 59 S. Ct. 954, 960-963, 969-971, 83 L. Ed. 1423, the district courts of the United States are given jurisdiction by 28 U.S.C. § 41 (14), 28 U.S.C.A. § 41 (14), over suits brought under Civil Rights Act without the allegation or proof of any jurisdictional amount." 319 U.S. at 161.

The Court in *King* v. *Smith*, therefore, by basing its jurisdiction on *Douglas*, however indirectly, clearly recognized the property rights — personal liberty distinction. It found that essentially only the latter was involved. The Court went to great lengths to demonstrate that the Alabama statute thwarted the policy of federal legislation to ascertain the true father of the child. The goal of the federal welfare system was to provide further "meaningful economic security for that [fatherless] child." 392 U.S. at 330. The Court recognized that "the enormity and pervasiveness of social ills caused by proverty" would be exacerbated by the substitute parent rule. 392 U.S. at 334. (Emphasis supplied.)

This point was amplified in a subsequent Welfare case, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). There the Court stated:

> "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as disqualification for unemployment compensation, denial of a tax exemption, or to discharge from public employment."

Id. at 262.

By adopting the entitlement approach, the Court thus elevated aid for dependent children above mere monetary value. This aid was found essential for a healthy and decent environment and an otherwise socially sound upbringing which all children require. The entitlement approach is thus analogous to the liberty to pursue one's chosen career as recognized in *Eisen* v. *Eastman at* 421 F. 2d 565. The personal liberty basis of such jurisdiction was again alluded to in a subsequent Welfare case, *Rosado* v. *Wyman*, 397 U.S. 397, (1970).

Here we are dealing with only a property right, namely, a checking account. Coloring this claim as an equal protection one, as plaintiff has attempted, does not alter this fact; otherwise we would elevate form over substance. *Alterman Transp. Lines, Inc.* v. *Pub. Serv. Comm'n. of Tenn.*, 259 F. Supp. 486, 492 (M.D. Tenn. 1966) (3 judge court), aff'd per curiam, 386 U.S. 262 (1967).

Nor does the fact that plaintiff may be or has been on Welfare as intimated in her affidavit (dated March 16, 1970, ¶¶ 5 and 9) make any difference. In addition, there is a serious question as to whether plaintiff is eligible for welfare in the first place. Section 17-2, Connecticut General Statutes, Revision of 1958, Revised to 1969, sets the maximum earned income for welfare recipients at $266.67 per month for a

family of two. In her complaint Mrs. Toro claims she earns $85.00 a week, or about $340.00 per month. Even deductions for taxes, social security and average insurance contributions could hardly account for the difference between her alleged pay and welfare eligibility limits.

It is important to note here, that the garnishment in this case is not against Mrs. Toro's wages, nor her welfare payments. It is not her wages or welfare payments which are frozen, but rather the sum of $103.99 which was on deposit in her checking account. These facts distinguish this case from *Sniadach* v. *Family Finance Corporation of Bay View*, 395 U.S. 337 (1969).

In *Sniadach a* garnishment was made of a debtor's wages prior to judgment. The Wisconsin statute made no provision for notice and hearing and therefore violated fundamental principles of due process. Mr. Justice Douglas speaking for the Court stated: "We deal here with wages — a specialized type of property presenting distinct problems in our economic system." *Id.* at 340. After a discussion of the dependence of the wage earner on his earnings for the necessities of life for his family, the Court noted that:

> "... it appears that in Wisconsin the statutory exemption granted the wage earner is 'generally insufficient to support the debtor for any one week.'
>
> "The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall."
>
> *Id.* at 341 and 342.

The limited applicability of *Sniadach* to wage garnishment was clearly recognized by a unanimous three-judge federal court in *Balthazar* v. *Mari Ltd.*, 301 F. Supp. 103

(E.D. Ill. 1969). The Court upheld Illinois statutes authorizing realty tax deeds. The sale was for recovery of delinquent taxes and did not need a court judgment, although objections could be filed. The Court ruled that *Sniadach* was not controlling, stating:

> "The Supreme Court's recent garnishment decision, *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L. Ed. 2nd 349, is inapplicable. 'We deal here with wages — a specialized type of property presenting distinct problems in our economic system.'" 301 F. Supp. at 105, n. 5.

In this instant case, the Three-Judge District Court recognized the limitations of the *Sniadach* decision (See: Appendix p. 23, n. 3) and followed the *Eisen* case, *supra*, in its opinion.

> ". . . We hold that the decision of the Court of Appeals for this Circuit in *Eisen* v. *Eastman*, 421 F. 2d 560 (2 Cir. 1969), is dispositive of the threshold jurisdictional issue presented in both actions before us, namely, whether the rights here asserted, not being one of personal liberty but dependent for their existence upon the infringement of property rights, are outside the protection of 28 U.S.C. § 1343 (3) 1964. 421 F. 2d at 564 and 566. We hold they are.
>
> . . . .
>
> Interference with a Connecticut resident's right to the uninterrupted use of her bank account, like the interdiction of a New Yorker's right to rely upon an undiminished amount of rental income from his property, has to do almost entirely with the loss of money; it involves, at most, only an incidental deprivation of personal rights in the sense of 'personal liberty, not de-

pendent for its existence upon the infringement of property rights.' *Hague* v. *CIO*, 307 U.S. 496, 531 (1939); *Eisen* v. *Eastman*, *supra*, at 565."

(Appendix pp. 24 and 25)

IV.

PLAINTIFFS DO NOT CONSTITUTE A VALID CIVIL RIGHTS ACT CLASS.

In paragraph 5 of the Complaint the class allegedly represented by the Appellant, Mrs. Toro, encompasses "those residents of the State of Connecticut who have been and will be in the future, subjected to and are threatened with prejudgment attachment and garnishment as authorized by Sections 52-279, 52-280, 52-329, 52-304 of the Connecticut General Statutes. The members of the class on behalf of whom this action is brought are similarly affected by the statutes complained of herein and are so numerous as to make it impracticable to bring each one of them individually before this Court." The class as thus described may be said to represent practically every resident of the State of Connecticut including corporations, partnerships, associations and others. Insofar as the allegations of the Complaint are concerned, it does not appear that the Appellant-Plaintiff has been subjected to attachment proceedings under § 52-279 and § 52-280, Conn. Gen. Stat. Moreover, the class described is large and it is impossible for the plaintiff to declare that she will clearly and adequately protect the interests of the class. It is impossible to have common questions of law and fact affect all persons subject to attachment as well as all persons who are subject to garnishment under § 52-329, Conn. Gen. Stat. *Chaffee* v. *Johnson*, 229 F. Supp. 445, 448 (1964); *D & A Motors* v. *General Motors Corporation*, 19 F.R.D. 365, 367 (1956).

As stated previously this plaintiff does not complain of being threatened by direct attachment proceedings under §§ 52-279 and 52-280, Conn. Gen. Stat.

> "It is fundamental that an individual suing in behalf of the members of a class must be a member of the class which he proposes to represent. 2 Barron & Holtzoff Federal Practice and Procedure (Wright Ed. 1961) § 567, p. 308."

> "Plaintiff is not a proper representative of the class he purports to represent, and the class action aspects of this suit must fail."

Putt v. *Clark*, 285 F. Supp. 534, 535 (1967).

In paragraph 6 of Mrs. Toro's Complaint it is alleged that Deputy Sheriff Barrett represents the sheriffs, deputy sheriffs and constables of the State of Connecticut who are authorized to serve writs of attachment and garnishment. The defendant Barrett is not an elected sheriff and not being a member of the class, he is not a proper representative of such class. Furthermore, he is not a constable and for the same reason cannot purport to represent those persons elected constables in the municipalities in which they reside. *Putt* v. *Clark, Ibid.*

Furthermore, it does not appear of record that either the class allegedly represented by the plaintiff or the class represented by the defendant Barrett have received any notice in order that they might have the opportunity to present their objections. Notice under Rule 23 is an integral part of due process in a class action and under the circumstances as presented in this case they must be made aware of the pendency of the action in order to determine whether they wish to be included or excluded from the action.

V.

STAY OF STATE COURT PROCEEDINGS PROHIBITED BY 28 U.S.C. § 2283.

Title 28 U.S.C., § 2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Almost from the beginning of our judicial history Congress has restricted the grant of injunctions by federal courts to stay state court proceedings. Act of March 2, 1793, C. 22, 1 Stat. 333, 334. This provision, based on comity, is designed to promote harmony in our system of dual federalism.

> "The Act of 1793 expresses the desire of Congress to avoid friction between the federal government and the state resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process."
>
> *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 132 (1941) (Frankfurter, J.)

Consonant with this purpose, the term "proceedings" is a broad one.

> "That term [proceedings] is comprehensive. *It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process.* . . . It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment effective. . . . Thus the prohibition applies whatever the nature of the proceedings, unless the case presents facts which

bring it within one of the recognized exceptions to section [2283]." (Emphasis supplied.)

Hill v. *Martin*, 296 U.S. 393, 403 (1935).

In accordance with this rule, prejudgment garnishment of wages has been recognized as "proceedings" within the meaning of 28 U.S.C. 2283 and thus prohibited unless allowed by one of the statute's exceptions. *National Labor Relations Bd.* v. *Underwood Mach. Co.*, 198 F. 2d 93 (C.A. 5, 1952). Although the Court in that case found that one of those exceptions applied but in its discretion declined to intervene, it clearly premised its opinion on the fact that the garnishment was a state court proceeding.

This question was precisely faced recently in *Javelin Oil Co.* v. *T. C. Morrow Drilling Co.*, 266 F. Supp. 119 (E.D. La. 1967). There, a suit was filed in state court and a prejudgement lien for labor and material acted on by the sheriff pursuant to the suit. Six days later defendant sought a federal injunction to void the lien. The Court ruled that § 2283 applied and that the injunction could not be granted.

The Court also recognized the general rule that the jurisdiction of a court, state or federal, having in rem or quasi in rem control or disposition of specific property, cannot be interfered with by injunction of another forum. See also 1A Moore's Federal Practice (2d ed.) § 0.221 at 2605.

"Where a court of competent jurisdiotion has, by appropriate proceedings, taken property into its possession through its officers, the property thereby is withdrawn from the jurisdiction of all other courts."

Lion Bonding and Surety Co. v. *Karate*, 262 U.S. 77, 88, (1923); See also 1A Moore's Federal Practice (2d ed.) § 0.215 at 2508.

The prohibition in § 2283 against federal injunctions, moreover, cannot be avoided by labelling the restraint as against a party rather than directly against the court, itself. *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric Co.*, 309 U.S. 4 (1940); *Hill* v. *Martin, supra; Javelin Oil Co.* v. *T. C. Morrow Drilling Co., supra* (attaching creditor in state suit not enjoinable by federal court).

It is also clear that under § 2283 injunctive relief cannot be obtained merely by seeking both declaratory and injunctive remedies, as in this case. *H. J. Heinz Co.* v. *Owens*, (C.A. 9, 1951) 189 F. 2d 505, reh. den. 191 F. 2d 257, cert. den. 342 U.S. 905 (1952); 1A Moore's Federal Practice (2d ed.) § 0.220 at 2604.

Finally, the present suit does not fall under the exception in § 2283 for actions "expressly authorized by Act of Congress". As previously indicated, the statutory provisions for declaratory judgments themselves create no such exception. *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270 (1941).

It is also well recognized that the "color of law" statute under which plaintiff seeks relief, 42 U.S.C. § 1983, is not an exception to 28 U.S.C. § 2283.

> "The weight of authority and the better reasoned approach require a decision that Sec. 2283 prohibits the enjoining of these state proceedings and that Sec. 1983 is not an 'expressly authorized' exception to Sec. 2283. To hold otherwise would be to create a vast exception to Sec. 2283 and would do violence to the principles of comity and federalism which underlie it. Throughout our history the statute and its predecessors have played an important role in our federal system in curtailing 'needless friction between state and federal courts.' *Oklahoma*

Packing Co. v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9, 60 S. Ct. 215, 218, 84 L. Ed. 447 (1940)."

Brooks v. *Briley*, 274 F. Supp. 538, aff'd 391 U.S. 371 (1968).

The fact that the garnishment has been released does not legitimize injunctive relief. A state proceeding is still under way in this case. We submit that the cases of *Younger* v. *Harris, Jr., et al*, 91 S. Ct. 746 (1971), *Boyle* v. *Landry*, 91 S. Ct. 758 (1971), and *Perez Jr., et al* v. *Ledesma, et al*, 91 S. Ct. 674 (1971) are controlling.

CONCLUSION

The basis of the three-judge District Court decision dismissing the Appellant-Plaintiff's Complaint was twofold. First, that the rights asserted by the plaintiff under 42 U.S.C. § 1983 (3) were property rights as opposed to personal liberty rights, and therefore outside the protection of said statute. Secondly, that the anti-injunction statute, 28 U.S.C. § 2283 applies here. As the District Court noted in its opinion, there is no plaintiff in this case "as to whom the issue is not either purely monetary, moot, or already on the way to adjudication in an adequate state form." (Appendix p. 27.)

This appeal should be dismissed and the decision of the three-judge District Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert L. Hirtle, Jr., attorney for the appellee, Charles H. Barrett, Deputy Sheriff of New Haven County, certify that on the 15th day of June, 1971, I served a copy of the foregoing Brief by mailing, United States Mail, Postage Prepaid, to the following attorneys of record:

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